No. 03-1027

APR 9 -2004

IN THE

Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
as NEXT FRIEND OF JOSE PADILLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE HON. SHIRLEY M. HUFSTEDLER, HON. NATHANIEL R. JONES, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HERBERT J. STERN, HON. HAROLD R. TYLER, JR., R. SCOTT GREATHEAD, ROBERT M. PENNOYER, BARBARA PAUL ROBINSON, AND WILLIAM D. ZABEL IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Question 2 of the questions presented, as set forth in Petitioner's Brief, is as follows:

> Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority.

This brief does not address whether, in the abstract, the President has the power to detain an enemy combatant. Amici assert that, even if such power potentially exists either under Article II of the Constitution alone or with congressional authorization, it can only be exercised in conformity with the due process rights of the detainee guaranteed by the Fifth Amendment.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Introduction	1
Statement of Interest of Amici	2
Statement of the Case	3
Summary of Argument	3
Argument	5
I. This Court Can And Should Address The Due Process Standards To Which The Government Must Adhere In Establishing Grounds For Mr. Padilla's Detention	5
II. The Fifth Amendment Guarantees Mr. Padilla Notice And An Opportunity To Be Heard In An Adversary Hearing	6
A. Notice of the Facts Alleged In Support of Detention and an Opportunity to Be Heard in Opposition Are Essential To Due Process	6

Contents

	Page
B. Any Executive Authority to Restrict a Detainee's Due Process Rights Must be Rigorously Limited to Demonstrated Exigent Circumstances Particular to the Detainee	12
III. Mr. Padilla Has A Constitutional Right To Counsel To Challenge The Executive's Enemy Combatant Designation	18
A. Due Process Requires That Mr. Padilla Be Afforded Access to, and Assistance of, His Counsel	18
B. The Government's Asserted Interests Do Not Justify Denial of Counsel	20
IV. Due Process Requires The Executive To Prove By Clear And Convincing Evidence That Mr. Padilla Is An Enemy Combatant	23
A. The Executive Bears the Burden of Proof	24
B. The Standard of Proof that the Executive Must Satisfy is Clear and Convincing Evidence	25
C. The "Some Evidence" Standard is Insufficient	27
Conclusion	29

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Addington v. Texas, 441 U.S. 418 (1979) 26, 27

Almota Farmers Elevator & Wholesale v. United States, 409 U.S. 470 (1973) 5

Armstrong v. Manzo, 380 U.S. 545 (1965) 10

Barry v. Barchi, 443 U.S. 55 (1979) 15

Bilokumsky v. Tod, 263 U.S. 149 (1923) 25

Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found., 402 U.S. 313 (1971) 5

Boddie v. Connecticut, 401 U.S. 371 (1971) 15

Bounds v. Smith, 430 U.S. 817 (1977) 14

Bowles v. Willingham, 321 U.S. 503 (1944) 15

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) 9-10

Burns v. Wilson, 346 U.S. 137 (1953) 14

Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961) 9

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 15

Page

Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) 15

Chavez v. Martinez, 123 S. Ct. 1994 (2003) 23

Cleveland Board of Ed. v. Loudermill, 470 U.S. 532 (1985) 6-7, 10, 15

Connecticut v. Doehr, 501 U.S. 1 (1991) 9, 10

Duncan v. Kahanamoku, 327 U.S. 304 (1946) 11, 29

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 5

Ford v. Wainwright, 477 U.S. 399 (1986) 10

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 19

In re Gault, 387 U.S. 1 (1967) 7, 10, 18

Gerstein v. Pugh, 420 U.S. 103 (1975) 16

Givens v. Zerbst, 255 U.S. 11 (1921) 14

Goldberg v. Kelly, 397 U.S. 254 (1970) 9, 21

Grannis v. Ordean, 234 U.S. 385 (1914) 10

Greene v. McElroy, 360 U.S. 474 (1959) 13

Hiatt v. Brown, 339 U.S. 103 (1950) 14

Hirabayashi v. United States, 320 U.S. 81 (1943) ... 13

Cited Authorities

	Page
Jackson v. Virginia, 443 U.S. 307 (1979)	7
Johnson v. Zerbst, 304 U.S. 458 (1938)	24
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)	7
Kansas v. Hendricks, 521 U.S. 346 (1997)	8, 9
Korematsu v. United States, 323 U.S. 214 (1944)	12
Lassiter v. Dep't of Social Serv., 452 U.S. 18 (1981)	7, 19
McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)	15
Middendorf v. Henry, 425 U.S. 25 (1976)	19
Miller-El v. Cockrell, 537 U.S. 322 (2003)	24
Ex parte Milligan, 71 U.S. 2 (1866)	17, 18, 29
N. America Cold Storage Co. v. Chicago, 211 U.S. 306 (1908)	15
Ng Fung Ho v. White, 259 U.S. 276 (1922)	14, 28
Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)	*passim*
Padilla v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003)	*passim*

Cited Authorities

	Page
Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2004)	6, 18
Parratt v. Taylor, 451 U.S. 527 (1981)	15
Powell v. Alabama, 287 U.S. 45 (1932)	9, 20
In re Quirin, 317 U.S. 1 (1942)	14, 18
Riverside v. McLaughlin, 500 U.S. 44 (1991)	16, 23
Sandosky v. Kramer, 455 U.S. 745 (1982)	26, 27
Schall v. Martin, 467 U.S. 253 (1983)	9
Speiser v. Randall, 357 U.S. 513 (1958)	7
Stoehr v. Wallace, 255 U.S. 239 (1921)	15
Superintendent v. Hill, 472 U.S. 445 (1985)	28
Teague v. Lane, 489 U.S. 288 (1989)	5
In re Territo, 156 F.2d 142 (9th Cir. 1946)	18
United States v. $8,850, 461 U.S. 555 (1983)	16
United States v. Grimley, 137 U.S. 147 (1890)	14
United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993)	10
United States v. Salerno, 481 U.S. 739 (1987)	8, 16, 26, 27

Page

United States ex rel. Tisi v. Tod, 264 U.S. 131 (1924) 28

Vance v. Terrazas, 444 U.S. 252 (1980) 5

Ver Mehren v. Sirmyer, 36 F.2d 876 (8th Cir. 1929) 14

Vitek v. Jones, 445 U.S. 480 (1980) 18

Walker v. Johnston, 312 U.S. 275 (1941) 25

In re Winship, 397 U.S. 358 (1970) 26

Woodby v. I.N.S., 385 U.S. 276 (1966) 25

In re Yamashita, 327 U.S. 1 (1946) 18

Zadvydas v. Davis, 533 U.S. 678 (2001) 7, 8, 26

UNITED STATES CONSTITUTION

Fourth Amendment 16

Fifth Amendment ..... i, 6

Sixth Amendment 19

Page

STATUTES

8 U.S.C. § 1226a(a)(2003) 17

8 U.S.C. § 1534(c)(1)(2000) 17

28 U.S.C. § 2254(e)(1)(2000) 24

18 U.S.C. § 4001(a)(2000) 3

RULE

Supreme Court Rule 14(1) 5

OTHER AUTHORITIES

Declaration of Michael H. Mobbs, August 27, 2002, Pet App. 167a-172a 13

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 19

Testimony of Attorney General John Ashcroft, U.S. House of Representatives, Committee on the Judiciary, June 5, 2003, available at http://www.usdoj.gov/testimony/2003/060503aghouseremarks.htm 22

Cited Authorities

Page

FOREIGN STATUTES

Terrorism Act 2000, c. 11, sched. 8 (Eng.) 23

Incarceration of Unlawful Combatants Law, 5762-2002 (Israel) 23

Prevention of Terrorism Act, Act No. 15 of 2002 (India) 23

INTRODUCTION

The power of the Executive to arrest a citizen, declare that citizen an enemy of the state, and hold that citizen incommunicado in indefinite detention beyond independent judicial scrutiny is the hallmark of despotism. In its assertion of a power of indefinite detention on unproven charges, in its failure to disclose its definition of "enemy combatant" on which the detention hinges, in its refusal to submit to any procedures in which the factual grounds for the detention can be contested, and in its insistence that the detainee have no access to counsel already engaged to represent him, the Executive in this case lays claim to unprecedented power over American citizens, and seeks to defend before this Court a regime that bears no resemblance to anything recognizable as due process of law.

A group of substantially the same amici as are filing this brief recently submitted an amicus brief in *Hamdi v. Rumsfeld*, No. 03-6696 (filed Feb. 23, 2004). In that brief, amici demonstrate that the historic role of habeas corpus, and its unique importance in implementing the constitutional separation of powers, guarantees meaningful, independent judicial review of the asserted factual as well as legal grounds for executive detention. In the present brief, amici examine the due process limitations on the exercise of any assumed executive power to detain citizens as "enemy combatants." The briefs are complementary and intended to be read together.[1]

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1. This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk. No counsel for the parties has authored this brief in whole or in part. No person other than amici and their counsel has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICI

Amici, the former federal judges and attorneys listed below who have devoted their careers to promoting the rule of law as implemented in our nation's courts, have an abiding interest in the independence of the judiciary as a check on the actions of the executive branch.

Judge Shirley M. Hufstedler served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979. She has also served as the United States Secretary of Education.

Judge Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

Judge William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Judge H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Judge Herbert J. Stern served as a judge on the United States District Court for the District of New Jersey from 1973 to 1987. He also served as the United States Judge for Berlin from 1979 to 1980.

Judge Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

R. Scott Greathead is a member of the New York bar and an international human rights advocate. He has traveled to more than a dozen countries to advocate the rights of persons under executive detention.

Robert M. Pennoyer is an attorney in private practice in New York City. He has served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, the Assistant to the General Counsel of the Department of Defense, and the Special Assistant to the Assistant Secretary of Defense for International Security Affairs.

Barbara Paul Robinson is an attorney in private practice in New York City. She is a former President of the Association of the Bar of the City of New York.

William D. Zabel is an attorney in private practice in New York City and is the Chair of Human Rights First, formerly known as the Lawyers Committee for Human Rights.

STATEMENT OF THE CASE

Amici respectfully refer the Court to the Brief for Respondents for a full statement of the case.

SUMMARY OF ARGUMENT

The Court has power and discretion to decide what process is due to a citizen detained as an "enemy combatant," as a question fairly presented by the petition for certiorari. If the Court decides that, notwithstanding the Non-Detention Act, 18 U.S.C. § 4001(a)(2000), the Executive has such power, it *should* reach the due process issues because the constitutional legitimacy of the Executive's asserted power

to detain cannot be assessed separately from the protections for individual rights that are afforded when such power is exercised. (Point I).

The long-term deprivation of Mr. Padilla's liberty cannot constitutionally be accomplished without affording Mr. Padilla the essentials of due process: notice of the grounds for his detention and a meaningful opportunity to be heard to contest those grounds, both legally and factually. While notice and a hearing may be deferred to a point in time after the initial detention where it would be impossible or improvident to grant a pre-deprivation hearing, due process must be afforded promptly thereafter, as determined by the courts. (Point II).

In order to effectuate Mr. Padilla's due process rights, he must be afforded meaningful access to and assistance of counsel as of right. Doing so will not interfere with legitimate national security concerns. (Point III).

In order to effectuate Mr. Padilla's due process rights, and to maintain the independence of the judiciary as the cornerstone of the separation of powers, the burden and standard of proof must be allocated properly. Once a habeas petition is filed that *prima facie* demonstrates that the petitioner has been deprived of a liberty interest protected by the Due Process Clause and that no prior constitutionally adequate proceedings have occurred to establish the basis for the detention, the burden lies with the Executive to justify the detention. It must do so by at least clear and convincing evidence, because the habeas court is sitting not in collateral review of a prior adjudication but by default as the initial forum. The "some evidence" standard is not sufficient where there has been no prior judicial or quasi-judicial process whatsoever. (Point IV).

ARGUMENT

I. This Court Can And Should Address The Due Process Standards To Which The Government Must Adhere In Establishing Grounds For Mr. Padilla's Detention

Even if this Court should find that the Executive has the power to detain an enemy combatant, such power can under no circumstances be exercised with indifference to the right of the detainee not to be deprived of liberty without due process of law. The power to detain, if it exists, is not absolute, and the legitimacy of its exercise in a particular case cannot be assessed without scrutiny of the procedures employed to establish that grounds for detention exist. For that reason, if the Court holds that the Executive, at least under some conditions, does have the power to detain an enemy combatant, the Court can and should address the procedural safeguards that are necessary to render such a detention constitutionally tolerable by assuring a reliable determination that the detainee *is* in fact an enemy combatant.

This Court has the power and broad discretion to reach the due process issues. Those issues, although not expressly set forth in the question presented in the petition for certiorari, are "fairly included" within it, *see* Supreme Court Rule 14(1), because the due process issues are "predicate to intelligent resolution" of the question expressly presented in the petition, and essential to proper analysis of the government's claim of power to detain an enemy combatant. *Vance v. Terrazas*, 444 U.S. 252, 259 n.5 (1980).[2]

2. The Court has also reached questions expressly presented (as are the due process issues here) by a respondent's brief, *see Almota Farmers Elevator & Wholesale v. United States*, 409 U.S. 470, 473 n.1 (1973), a question presented by amici, *see Teague v. Lane*, 489 U.S. 288, 300 (1989), or based on the Court's own determination that the issue is significant, even if not discussed by the parties. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), discussed in *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971).

The due process issues were not reached by the Second Circuit below because of its conclusion that the Executive did not possess the authority to detain Mr. Padilla, *Padilla v. Rumsfeld*, 352 F.3d 695, 699 n.1 (2d Cir. 2004), but were fully briefed in the courts below and are the subject of extensive analysis by Chief Judge Mukasey in the district court, see *Padilla v. Bush*, 233 F. Supp. 2d 564, 599-610 (S.D.N.Y. 2002) and *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-57 (S.D.N.Y. 2003) (on motion for reconsideration), and relied on by Judge Wesley in the Second Circuit as well. 352 F.3d at 732-33. They also have been extensively briefed in the *Hamdi* case, now before the Court. *See* Brief for Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696 (filed February 23, 2004) at 14-24; Brief for the Respondents, *id.* (filed March 29, 2004), at 34-49. The government also has an opportunity, in its reply brief in this case, to expand on those issues.

In sum, if this Court determines that the Executive has power to detain Mr. Padilla, that is merely the beginning and not the end of the vital constitutional questions presented by this case. The exercise of any such power must comport with the safeguards for individual liberty that are established in the Constitution.

II. The Fifth Amendment Guarantees Mr. Padilla Notice And An Opportunity To Be Heard In An Adversary Hearing

A. Notice of the Facts Alleged In Support of Detention and an Opportunity to Be Heard in Opposition Are Essential To Due Process

The Due Process Clause of the Fifth Amendment "provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Ed.*

v. Loudermill, 470 U.S. 532, 541 (1985). At root, due process means fundamental fairness. *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 24 (1981). A judicial result, however harsh, derives legitimacy in large part from the fairness of the procedures employed in reaching it. As stated by Justice Frankfurter:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 169-172 (1951) (Frankfurter, J., concurring); *accord*, *In re Gault*, 387 U.S. 1, 21 (1967); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] person cannot incur the loss of liberty for an offense without notice and an opportunity to be heard.").

Mr. Padilla's interest in liberty from physical detention is a constitutionally-protected interest of the highest order. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). This Court has referred to the right to physical liberty as a right of "transcending value," necessitating a high level of constitutional protection against arbitrary or unjustified deprivations. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) ("The contours of this historic liberty interest . . . always have been thought to encompass . . . freedom from bodily restraint and punishment."). The deprivation here is both complete and of indefinite duration.

As this Court recently held, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 689. If that is so, the assertion of executive power, ungoverned by any statutory authorization or procedural scheme, to apprehend an American citizen and hold him incommunicado for the duration of an undeclared and potentially never-ending "war on terrorism" presents more than a constitutional "problem." It is a direct challenge to the rule of law embodied in the Due Process Clause of the Constitution. As *Zadvydas* and earlier decisions of this Court make plain, government detention of an individual violates the Due Process Clause unless the detention is ordered in a criminal proceeding or in a few, narrowly circumscribed instances, where special justification for non-punitive detention exists. *Id.* at 690; *see also Kansas v. Hendricks*, 521 U.S. 346 (1997) (commitment for mental illness); *United States v. Salerno*, 481 U.S. 739 (1987) (pre-trial detention).

Even in the very narrow range of circumstances in which the Court has considered statutory non-criminal detention schemes, it has strictly scrutinized the safeguards provided for protection of the detainee's rights and "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals *and* subject to strong procedural protections." *Zadvydas*, 533 U.S. at 690-91 (emphasis supplied) (detention of removable aliens). Although "suspected terrorists" might qualify as a class of "specially dangerous individuals," *id.*, the quoted language makes clear that even members of such a class are entitled to strong procedural protections in the event of detention. *See also id.* at 721-22 (Kennedy, J., dissenting) (compliance with due process requires "adequate procedures" to review immigration detainees' cases). Here, where the Executive asserts inherent constitutional authority to engage in such detention – in the absence of any specific statutory scheme that might otherwise structure or constrain that authority –

it is even more important that procedural protections be observed. *Cf. Hendricks*, 521 U.S. at 353 (statutory scheme of civil commitment for mental illness met due process requirements where individual was provided counsel, the right to present evidence and cross-examine witnesses, and access to the government's evidence against him); *Schall v. Martin*, 467 U.S. 253, 275-77 (1983) (statute providing for pre-trial detention of a juvenile offender must provide adequate "procedural safeguards"; requirement satisfied where statute provided for formal hearing at initial appearance, and "formal, adversarial hearing" no more than six days later, wherein juvenile was provided counsel and an opportunity to present evidence and cross-examine witnesses).

The Court has often reminded us that due process is a flexible concept that takes its meaning in a specific case from the weight of the individual interest at stake and the potency of the countervailing governmental need. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 10 (1991); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Yet, harmonizing those competing interests has never resulted in total abrogation of the individual right to physical liberty without *any* process at all. In this case as much as in any other the Court has decided, a way must be found to accommodate legitimate governmental interests while preserving the due process rights of the individual, the universally recognized elements of which are notice and an opportunity to be heard. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

(1) *Notice* – It is not sufficient simply to apprise an individual that the government intends to take action against him. As this Court has stated, due process "principles require that a recipient have timely and adequate notice detailing the reasons" for an adverse government action. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). *See also Brock v. Roadway*

Express, Inc., 481 U.S. 252, 264-65 (1987) ("the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence"); *Gault*, 387 U.S. at 33-34 ("Due process of law . . . does not allow a hearing to be held in which a youth's freedom . . . [is] at stake without giving [him] timely notice, in advance of the hearing, of the specific issues that [he] must meet.")

(2) *The Right to a Hearing* – "The fundamental requisite of due process is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has recognized that an adversary proceeding is essential to preserving a meaningful right to be heard. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993).

Providing an adversary hearing when significant rights are at stake is both fundamentally fair and the best way to minimize the risk of errors that would undermine the legitimacy of the deprivation. In *Loudermill*, this Court held that "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision" where factual disputes exist. 470 U.S. at 543. Likewise, under the Due Process Clause a "skeletal affidavit" submitted by one side is an insufficient basis on which a judge or other factfinder could base a factual determination, because such an affidavit constitutes a "one-sided, self-serving, and conclusory submission," reliance on which creates a high likelihood of error, *Doehr*, 501 U.S. at 14 – words that could have been written for this case. *See also Ford v. Wainwright*, 477 U.S. 399, 414-15 (1986)

(recognizing high risk of error when no adversarial process exists to provide the factfinder with "potentially probative information").

At minimum, therefore, a meaningful right to be heard encompasses the right to present facts favorable to one's case, and, perhaps more importantly, to rebut or challenge facts asserted by the other side. Here, so far as the record discloses, Mr. Padilla has received no notice whatsoever of the grounds for his detention or the allegations of fact or supporting evidence on which the Executive relies. *See* Amended Petition for Writ of Habeas Corpus, J.A. 46-57 at ¶¶ 4-5 (alleging that Mr. Padilla has not been given notice of the grounds for his detention). Nor has he received anything approaching a "meaningful" right to be heard. The government seeks to impose a deprivation of liberty on Mr. Padilla based only upon the unchallenged, unreviewed, and unrebutted allegations in its own affidavits. The risk of error inherent in such non-process, in which the Executive is the judge of its own case, is self-evident. The Executive's institutional role in times of a national security crisis is to safeguard the nation from danger, and the temptation to mistake suspicion for fact under those circumstances is unavoidable. *See Duncan v. Kahanamoku*, 327 U.S. 304, 329 (1946) (Murphy, J., concurring) (refusing to "abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war"). Moreover, despite even diligent and good faith inquiry, the Executive may be unaware of exculpatory facts sufficient to dispel suspicion.[3] And, finally, the absence of a forum for independent decisionmaking by a court that has heard the evidence submitted by both sides creates the ultimate risk of

3. News reports from the "war on terror" highlight the potential for error where determinations of guilt are made in the absence of process. *See* Amicus Brief of Judge Nathaniel R. Jones, et al., *Hamdi v. Rumsfeld*, No. 03-6696, at 6 nn.7-10 (filed Feb. 23, 2004).

error: arbitrary or intentional acts of detention by an overreaching Executive who could declare any U.S. citizen an enemy of the state and detain him on unsubstantiated charges.

B. Any Executive Authority to Restrict a Detainee's Due Process Rights Must be Rigorously Limited to Demonstrated Exigent Circumstances Particular to the Detainee

The Executive contends that the exercise of its claimed military power in "wartime" to detain "enemy combatants" somehow changes the calculus so profoundly that due process must be swept away on the strength of national security concerns. The argument is circular, as it assumes as true the jurisdictional fact that the government has yet to prove: that Mr. Padilla is an enemy combatant. The government's position reflects not so much a compelling security interest in detaining "enemy combatants" as it does a desire to detain anyone whom it *says* is an enemy combatant without permitting any inquiry into whether the allegation is true. It is a claim reminiscent of the now-discredited World War II decisions that led to thousands of loyal American citizens being deprived of their liberty without opportunity to contest the assumptions that underlay their detention. *See Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion order of citizens of Japanese ancestry); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding curfew for citizens of Japanese ancestry).

This Court has never accepted the extreme position that national security concerns, or the exercise of military power, completely override due process. For example, in a case considering the government's revocation of a defense worker's security clearance for national security reasons, this Court held that the right to rebut the government's evidence

– a hallmark of due process – was essential to the reasonableness of the outcome:

> While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.

Greene v. McElroy, 360 U.S. 474, 496 (1959). The Court's concern about the reliability of evidence to support a deprivation of rights speaks directly to the present case, where the Executive admits that some of the evidence against Mr. Padilla comes from informants who have not been completely truthful, who may have a motivation to deceive and who have recanted some of their allegations. Declaration of Michael H. Mobbs, August 27, 2002, Pet. App. 167a-172a, at 168a n.1.

Similarly, in the context of reviewing decisions of courts-martial on petitions for habeas corpus, the Court has explained that due process requires *de novo* review for claims that the court-martial did not adequately consider:

> [t]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which

> have long been recognized and honored by the military courts as well as the civil courts.

Burns v. Wilson, 346 U.S. 137, 142-43 (1953) (plurality op.). And, in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), the Court held that the Due Process Clause requires Article III courts to conduct full *de novo* review of the jurisdictional fact of citizenship in immigration cases, noting that "[t]he situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service." The Court found it "well settled" that the courts could review the jurisdictional fact of the defendant's military status. *Id.* at 284; *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *see also Givens v. Zerbst*, 255 U.S. 11, 20 (1921); *Ver Mehren v. Sirmyer*, 36 F.2d 876, 880 (8th Cir. 1929).[4]

The Court's precedents, therefore, provide no support for the proposition that the Executive's military powers, or even compelling national security concerns, can eliminate an individual's due process rights. "The cost of protecting a constitutional right cannot justify its total denial." *Bounds v. Smith*, 430 U.S. 817, 825 (1977). At most, the Executive's interests can affect the timing and content of the process that is due. For example, the Court has repeatedly confronted cases in which a hearing prior to the deprivation of a

4. *In re Quirin*, 317 U.S. 1 (1942), decided only that a military tribunal was an appropriate forum in which to try the German saboteurs, who did not contest the essential factual allegations against them. *Id.* at 45. Nothing in *Quirin* supports the claimed executive power to hold alleged enemy combatants in indefinite detention without a hearing. The Court's affirmation of the petitioners' right to present their constitutional claims in court (even in the face of a Presidential Proclamation purporting to deny such access, *id.* at 24), flies in the face of the Executive's position in this case seeking to minimize if not eliminate Mr. Padilla's right to a meaningful hearing.

constitutionally protected interest was claimed to be impossible, impractical, or contrary to some governmental interest. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974); *see also N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315-16 (1908). In such cases, this Court has consistently required some showing of exigent circumstances necessitating "quick action by the State," *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), or other "countervailing state interest of overriding significance," *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), to justify deferring the notice and hearing that due process otherwise requires.

While deferring the right to a hearing can therefore satisfy due process requirements in extraordinary circumstances, it does not provide the government with carte-blanche authority to deny a hearing altogether or to delay it beyond the time when the immediate emergency has dissipated. Purported wartime measures are not exempt from that principle; while the Court has upheld emergency measures in both World War I and World War II that deferred a hearing until after a governmental deprivation of property, in each case there was an opportunity to contest the deprivation after it occurred. *See Stoehr v. Wallace*, 255 U.S. 239 (1921) (seizure of enemy alien property); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921) (same); *see also Bowles v. Willingham*, 321 U.S. 503, 521 (1944) (Emergency Price Control Act provided for contest by landlord of order fixing rents after it issued).

The fact that a post-deprivation hearing may be deemed an adequate remedy does not vitiate the requirement that a hearing be held "at a meaningful time and in a meaningful manner." *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 n. 22 (1990). "At some point, a delay in the post-termination hearing . . . become[s] a constitutional violation." *Loudermill*, 470 U.S. at 547; *see also Barry v. Barchi*, 443 U.S. 55, 65 (1979) (finding

that a statute imposing no time limit within which an administrative hearing must be held after suspension of state license did not pass constitutional muster; rather, due process required a "prompt proceeding and a prompt disposition").[5] While there is no bright-line rule defining the outer limits of a "meaningful time," *see United States v. $8,850*, 461 U.S. 555, 562 (1983), that requirement is clearly not satisfied where a hearing is denied for months and, as here, years after the initial deprivation with no justification specific to this detainee. When this Court has permitted governmental interests to effect some adjustment in the process due the individual, it has taken care to limit the incursion on individual rights to that which is necessary to satisfy the governmental necessity. *See, e.g., Salerno*, 481 U.S. at 747 (detention must not be "excessive" means of fulfilling government purpose); *see also Padilla*, 233 F. Supp. 2d at 610 (government's need to detain may be "mooted" by the passage of time).

Here, the government deems the continuing menace of al Qaeda and the war on terror the emergent situation that justifies the deprivation of Mr. Padilla's liberty, but that war may persist indefinitely, and a detainee's hearing cannot await a declaration of victory or an act of grace by the Executive. The Executive's national security responsibilities surely permit it to interdict imminent harm by seizing those who pose a threat before due process is afforded, but that is an

5. Analogously, under the Fourth Amendment, in cases where the requirement of a pre-arrest warrant is excused, a hearing must be provided as soon as reasonably possible after the arrest to comply with constitutional requirements. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975) ("[o]nce the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate" and the detainee is entitled to a "prompt" hearing as a prerequisite to "extended restraint"); *Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (individual subject to warrantless arrest must generally be provided with hearing within 48 hours of arrest).

exigent circumstance linked to the particular circumstances of an individual detainee, and one that plainly diminishes over time. The generalized interest in holding all detainees indefinitely without hearing or access to counsel in the hope of extracting all possible information from each one of them cannot be a sufficient basis to deny due process, if that constitutional guarantee is to have any meaning. In the absence of a controlling and constitutionally acceptable statutory scheme, exactly where to draw the line can only be assessed on a case-by-case basis.[6] But it must be based on specific circumstances of the particular detainee, and it must be a decision of the independent judiciary, not the *ipse dixit* of the detainer.

6. In statutes that do not apply to the case of Mr. Padilla, Congress has legislated procedures to govern detention of certain alleged terrorists. In the Anti-Terrorist and Effective Death Penalty Act of 1996, Congress provided that in a removal hearing, aliens detained on suspicion of terrorism would be afforded assistance of counsel, 8 U.S.C. § 1534(c)(1)(2000), while the USA Patriot Act requires that within seven days of the detention of an alien based on national security concerns, the Attorney General must either commence removal or criminal proceedings, 8 U.S.C. § 1226a(a)(2003) – legislative judgments that stand in stark contrast to the treatment of Mr. Padilla by the Executive. Similarly, during the Civil War, Congress authorized the suspension of the writ of habeas corpus but required that the names of all persons held by the President, "other than as prisoners of war," must be furnished to the federal courts, and that those persons must be discharged if not indicted as of the end of the session of the current grand jury. *See Ex parte Milligan*, 71 U.S. 2, 5 (1866).

III. Mr. Padilla Has A Constitutional Right To Counsel To Challenge The Executive's Enemy Combatant Designation

A. Due Process Requires That Mr. Padilla Be Afforded Access to, and Assistance of, His Counsel

Chief Judge Mukasey held that Mr. Padilla's right to present facts in connection with his habeas corpus petition "will be destroyed utterly if he is not allowed to consult with counsel." *Padilla*, 233 F. Supp. 2d at 604. Circuit Judge Wesley agreed: "Mr. Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone." *Padilla*, 352 F.3d at 732. The habeas hearing will be Mr. Padilla's first and perhaps only opportunity to contest the Executive's enemy combatant designation. That hearing would be a charade if Mr. Padilla were disabled from consulting his counsel in confidence to prepare for the hearing and appearing side-by-side with his counsel at the hearing to present his case. Indeed, in every military detention case of which we are aware, the detainees were represented by counsel, and there is no hint that their right to unimpaired access to counsel was questioned. *See, e.g., In re Yamashita*, 327 U.S. 1, 6 (1946); *In re Quirin*, 317 U.S. 1, 23-24 (1942); *Ex parte Milligan*, 71 U.S. 2, 8-9 (1866); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).[7]

This Court has repeatedly protected the right to counsel in non-criminal proceedings implicating liberty interests within the ambit of the Due Process Clause. *Gault*, 387 U.S. at 41, *Vitek v. Jones*, 445 U.S. 480, 497-500 (1980) (opinion

7. While Mr. Padilla has recently been granted, at the discretion of the government, a very limited right to meet with his lawyers in the presence of military officials, see Brief for Petitioner at 12 n.5, this should not affect this Court's consideration of the instant claim that Mr. Padilla as a matter of right is entitled to access to and assistance of his counsel.

of White, J.); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).[8] The Due Process Clause creates a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter*, 452 U.S. at 27.

The presumption that there is a right to counsel applies to Mr. Padilla because, the habeas corpus proceeding is his first and perhaps only opportunity to challenge the deprivation of his physical liberty. Moreover, because the Government's designation of Mr. Padilla as an enemy combatant is based on alleged illegal activity, Mr. Padilla's already fundamental interest in physical liberty "may be supplemented by the dangers of criminal liability" inherent in a proceeding at which he contests his involvement in the alleged illegal activity. *Id.* at 31. Mr. Padilla, therefore, needs the assistance of counsel not only to effectively contest his designation as an enemy combatant but also to ensure that his statements at the hearing do not place him in future legal jeopardy.

The possibility of an erroneous decision in the absence of counsel is high. Mr. Padilla's need to consult with a lawyer

8. Mr. Padilla may also be entitled to counsel under the 6th Amendment, because his detention, while not formally commenced by criminal charges, is essentially punitive in intent. *See Middendorf v. Henry*, 425 U.S. 25, 39-42 (1976) (adopting functional approach to whether particular proceeding was tantamount to a criminal prosecution for 6th Amendment purposes). Mr. Padilla's detention is punitive because the Executive has declared all alleged al-Qaeda associates to be "unlawful" combatants, and has used that charge to deprive them of the rights of prisoners of war under the Geneva Convention, such as the right to be free from unduly coercive interrogation. *See* Brief for the Respondents in Opposition to Petition for Writ of Certiorari, *Hamdi v. Rumsfeld*, No. 03-6696 (filed December 3, 2003), at 24, 29; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

to help him to present and contest facts is obvious. *See Padilla*, 233 F. Supp. 2d at 602. Mr. Padilla's need for assistance in building a factual record is far more acute than in the ordinary habeas case, in which a factual record and resultant findings already exist. In any event, "he has no ability to make fact-based arguments because, as is not disputed, he has been held incommunicado during his confinement." *Id.*

B. The Government's Asserted Interests Do Not Justify Denial of Counsel

The government's asserted needs here to incapacitate and interrogate detainees such as Mr. Padilla do not justify indefinite detention without notice, hearing, or access to counsel. Indeed, the district court observed that the Jacoby Declaration submitted by government, see J.A. 75-88, was devoid of factual support for those alleged justifications either generally or in the case of Mr. Padilla. *See Padilla*, 243 F. Supp. 2d at 52-53 (motion on reconsideration). The district court also held that denial of all access to counsel was not narrowly tailored to achieve the Government's stated objectives. *See Padilla*, 233 F. Supp. 2d at 603-605.[9]

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9. The government's contention in the courts below that Mr. Padilla should have no access to his counsel was particularly troubling, because Mr. Padilla (through his counsel and next friend) was not asking that counsel be appointed for him, only that he have access to an attorney already acting for him. As this Court observed in *Powell v. Alabama*, 287 U.S. 45, 69 (1932),

> [i]f in any case, civil [or] criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

(Cont'd)

The government's legitimate interest in incapacitating persons who would threaten the nation's safety is served as well by criminal prosecution as it is by military detention, and therefore provides no support for the government's implicit position that remitting Mr. Padilla to the criminal justice system would frustrate its national security objectives. Indeed, the criminal justice system had so successfully incapacitated Mr. Padilla that the military needed only arrive at the civilian jail house and peacefully escort him to his military prison.

The government also asserts the need to interrogate Mr. Padilla without interference from counsel or hope of release. But the need to interrogate the detainee without interference by counsel or court is both unsubstantiated as a matter of fact and illegitimate as a matter of law.

Chief Judge Mukasey made a finding that Mr. Padilla's contact with counsel would cause "minimal or nonexistent" interference with the government's then-continuing interrogation. *Padilla*, 233 F. Supp. 2d at 603. Moreover, if the detainee were granted a timely hearing that resulted in confirmation of his status, interrogation could proceed thereafter. If, as it maintains, the Executive is seeking to create a sense of hopelessness and dependency in the detainee, the surest way to do so is to accelerate to conclusion rather than delay a hearing and judicial review of his case, as the district court observed. *Padilla*, 243 F. Supp. 2d at 52 (on motion for reconsideration). Thereafter, the detainee will have strong incentives to cooperate as the only way to "cut his losses." *Id.* at n.7. The criminal justice system

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(Cont'd)

See also Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (even where the constitution does not require that the government provide counsel, due process requires that a person threatened with a deprivation of property "must be allowed to retain an attorney if he so desires").

provides the same incentives, which in other cases the Department of Justice has exploited specifically in the context of the "war on terror":

> The Department [of Justice] also used one of the most effective tools at the government's disposal – the leverage of criminal charges and long prison sentences. As is often the case with criminal defendants, when individuals realize that they face a long prison term like those under the PATRIOT Act, they will try to cut their prison time by pleading guilty and cooperating with the government
>
> In fact, since September 11, we have obtained criminal plea agreements, many under seal, from more than 15 individuals, who must – and will continue to – cooperate with the government in its terrorist investigations.

(Testimony of Attorney General John Ashscroft, U.S. House of Representatives, Committee on the Judiciary, June 5, 2003, available at *http://www.usdoj.gov/ag/testimony/2003/060503aghouseremarks.htm.*)

In sum, the government has multiple lawful means of obtaining information from Mr. Padilla, both in the civilian criminal justice system and in a properly authorized and regulated regime of executive detention that honors the detainee's procedural due process rights. The government, however, has no legitimate interest in interrogation that violates individual rights guaranteed by the Constitution. Indeed, the Executive's generalized interest in holding Mr. Padilla incommunicado for interrogation also proves too much, as the Executive can plausibly assert that by such tactics it may be able to obtain useful information from any

military detainee, or for that matter any person accused of crime. Our Constitution long ago rejected such arguments as "sufficient reason" to override individual rights. *See Chavez v. Martinez*, 123 S. Ct. 1994, 2008 (2003); *id.* at 2012 (Stevens, J., concurring in part); *id.* at 2016 (Kennedy, J., concurring in part). *See also Riverside v. McLaughlin*, 500 U.S. 44, 61 (1991) (Scalia, J., dissenting: "[I]t was clear [at common law] . . . that the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention."). Similarly, the judgment of other democratic nations has been to afford accused terrorists access to counsel soon after they are apprehended.[10]

IV. Due Process Requires The Executive To Prove By Clear And Convincing Evidence That Mr. Padilla Is An Enemy Combatant

The Executive does not dispute that no judicial or quasi-judicial forum has considered its claim that Mr. Padilla is an enemy combatant. The Executive relies exclusively on untested facts within its own control, and which have not

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10. For example, British law guarantees citizens in Padilla's position access to a lawyer as soon as practicable and within 48 hours in all cases. Terrorism Act 2000, c. 11, sched. 8 ¶¶ 7-9 (Eng.). The 2002 Israeli law allowing the detention of so-called "unlawful combatants" guarantees access to counsel and requires that the detainee be brought before a court within fourteen days. Incarceration of Unlawful Combatants Law, 5762-2002, § 6, § 5(a). India's 2002 counter-terrorism law requires that a suspected terrorist be informed of the right to counsel upon reaching the police station; have access to counsel during the interrogation process; and be detained no longer than ninety days, unless a special court approves an extended detention. Prevention of Terrorism Act, Act No. 15 of 2002, § 52 ¶¶ 2, 4, § 49 ¶ 4.

been exposed to legal challenge, to support its continued detention of Mr. Padilla. Because the Executive has never before laid claim to the awesome power to detain citizens without due process, amici are aware of no precedent directly on point that establishes the standards and burdens of proof that must be applied in this situation in order to comport with due process. The Court's precedents, however, as well as logic and fairness, command the conclusion that once a detainee such as Mr. Padilla sets forth a *prima facie* case that he has been detained without the benefit of any prior fact-finding procedures to establish the grounds for detention, the burden must be on the government to establish by at least clear and convincing evidence to the satisfaction of the habeas court that constitutionally acceptable grounds for detention exist at the time the hearing is held. The "some evidence" standard proposed by the district court, see *Padilla*, 233 F. Supp. 2d at 610, is an inapposite standard used for review of previously-made judicial or quasi-judicial findings, not a burden of proof, and cannot constitutionally be applied here where no prior hearing has occurred and no tribunal has made findings based on evidence relevant to the constitutionality of the detention.

A. The Executive Bears the Burden of Proof

Because Mr. Padilla has never been afforded any hearing, the government has never been called upon to persuade any judicial officer or tribunal that Mr. Padilla is an enemy combatant. In a habeas proceeding that seeks collateral review of a prior judicial determination, the party that files the writ bears the burden to establish that there has been a constitutional deprivation. *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938); *see* 28 U.S.C. § 2254(e)(1)(2000) (prior state-court proceeding is "presumed correct" unless the petitioner can rebut that presumption with "clear and convincing evidence"); *e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Underlying that allocation of the burden of proof is the "presumption of regularity which the record of the trial imports. . . ." *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

Here, however, there has been no trial; there is no record. There has not been even a hint of a constitutionally adequate proceeding. Mr. Padilla cannot reasonably be asked to prove the negative: that he is not an enemy combatant. In this case, the burden of proof must lie with the government to prove the essential jurisdictional facts that justify the deprivation of liberty. *See, e.g.*, *Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("alienage is a jurisdictional fact; and . . . an order of deportation must be predicated upon a finding of that fact; [and] the burden of proving alienage rests upon the government"); *Woodby v. I.N.S.*, 385 U.S. 276, 277 (1966) (the government "must establish the facts supporting deportability by clear, unequivocal, and convincing evidence"). In short, where a habeas petitioner such as Mr. Padilla makes out a *prima facie* case of a constitutional deprivation without a hearing, the burden of proof properly rests with the Executive to establish the jurisdictional fact that (as is assumed in this brief) would entitle it to detain Mr. Padilla: the alleged fact that he is an enemy combatant.

B. The Standard of Proof that the Executive Must Satisfy is Clear and Convincing Evidence

In many ways, the detention of Mr. Padilla is no different than that of a convicted criminal. Indeed, given the indefinite nature of his confinement, his inability to communicate with anyone, the refusal to accord him the rights of a prisoner of war under the Geneva Convention, and his lack of access to counsel, Mr. Padilla is worse off than incarcerated convicted criminals. Nevertheless, if the Executive has the power to detain an enemy combatant at all, it can only be because such a person falls within the small category of those who can

lawfully be detained even without a criminal conviction. *Zadvydas*, 533 U.S. at 689. In those cases, the Court heretofore has consistently ruled that detention is lawful only upon clear and convincing proof of the factual basis for detention.[11] *Salerno*, 481 U.S. at 751; *Sandosky v. Kramer*, 455 U.S. 745, 769-70 (1982); *Addington v. Texas*, 441 U.S. 418 (1979).

For example, the Bail Reform Act of 1984, which this Court reviewed in *Salerno*, permits the pre-trial detention of an arrestee pending trial on a showing of clear and convincing evidence of dangerousness. The Court held that because of the safeguards built into the Act, it survived a facial challenge to its constitutionality. Those procedural protections include that the government show probable cause that the arrestee presents a danger to society and that a full-blown adversary hearing is held before a federal court. In that adversary hearing, the arrestee has the right to counsel, the right to testify, and the right to challenge the government's witnesses. "When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751.

By contrast, here Congress has not legislated the standards or procedures pursuant to which the Executive may detain a putative enemy combatant. *Salerno* strongly suggests, however, that to support any form of detention other than as a result of a criminal conviction, the Constitution requires nothing less than the procedures legislated under

11. This brief focuses on Mr. Padilla's due process rights, and has not explored the implications of a determination that his detention is punitive and therefore de facto a criminal proceeding. If the detention of Mr. Padilla is viewed as tantamount to punishment for criminal acts, see footnote 8 *supra*, then proof beyond a reasonable doubt would be required. *In re Winship*, 397 U.S. 358, 364 (1970).

the Bail Reform Act, including requiring the government to prove "an identified and articulable threat" and to do so by clear and convincing evidence. *Id.* That conclusion is consistent with *Addington*, where this Court held that the Due Process Clause requires that the state justify the civil confinement of a mentally ill person with clear and convincing proof. 441 U.S. at 432. Similarly, in *Sandosky*, this Court held that because of the significant interests at stake and because of the sizable social cost of even occasional error, due process requires that parental rights may be terminated permanently only upon a showing, at a minimum, of clear and convincing evidence. 455 U.S. at 769-70.

C. The "Some Evidence" Standard is Insufficient

The district court ruled that Mr. Padilla would be entitled to contest the allegations brought against him, but that the court would "examine only whether the President had some evidence to support his finding that Mr. Padilla was an enemy combatant." *Padilla*, 233 F. Supp. 2d at 610.[12] If, as amici believe, the clear and convincing standard is constitutionally required, the far more deferential "some evidence" standard is not acceptable. In any event, considered on its own terms, there are several additional reasons why that standard is not the correct one.

12. It is unclear what that standard requires a court to do. Chief Judge Mukasey believed that the "some evidence" standard implied some opportunity for the detainee to attack the evidence proffered by the government, and to offer evidence of his own. *See Padilla*, 243 F. Supp. 2d at 56. Yet, the Executive has now taken the position that the "some evidence" standard, if applicable at all to military detentions in the "war on terror," would require uncritical acceptance by the court of the government's evidence and would not under any circumstances require "evidentiary proceedings." Brief for the Respondents, *Hamdi v. Rumsfeld*, No. 03-6696 (filed March 29, 2004), at 34-36. Although the district court's version of the standard is obviously closer to what the Due Process Clause requires, it still cannot be squared with this Court's holdings in *Salerno*, *Sandosky*, and *Addington*.

First, it cannot apply to jurisdictional facts essential to establish the Executive's power to exact a deprivation of an individual's liberty. For example, the Court has consistently distinguished between the Executive's determination to exercise its right to exclude or deport an alien, to which it applied the deferential "some evidence" standard of review, and the Executive's determination of the "jurisdictional fact" of alienage, *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133 (1924). The fact of alienage is one that a petitioner is entitled to challenge through a *de novo* judicial hearing of the evidence. *Ng Fung Ho*, 259 U.S. at 284-85.

Second, as the district court below conceded, *Padilla*, 243 F. Supp. 2d at 54, "some evidence" has never been used as a standard for judicial determination of the validity of allegations of fact by a prosecutorial authority, as opposed to judicial review of findings of fact previously made by a competent tribunal. *See, e.g., Superintendent v. Hill*, 472 U.S. 445 (1985). *Hill* approved the "some evidence" standard in review of the record of completed disciplinary proceedings, in which an inmate "must receive (1) advance written notice of the disciplinary charges; (2) an opportunity . . . to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *Id.* at 454. Because the facts said to justify Mr. Padilla's detention have not previously been found in any proceeding having even the minimal safeguards afforded to the inmates in *Hill*, and because the protected liberty interest for Mr. Padilla is of the highest order, the "some evidence" standard of review cannot withstand scrutiny as sufficient to meet due process requirements.

Third, the deferential "some evidence" standard would undermine the unique role of the federal courts and the writ of habeas corpus as the ultimate legal protection against Executive overreaching. The Court is respectfully referred

to the amicus brief filed by substantially all of the present amici in *Hamdi v. Rumsfeld*, in which the historical role of habeas corpus and its central place in the constitutional system of separation of powers is discussed. Brief of Amicus Curiae Nathaniel R. Jones et al., *Hamdi v. Rumsfeld*, No. 03-6696 (filed February 23, 2004).

CONCLUSION

Reflecting on one of our nation's most trying crises, the Court in *Ex parte Milligan*, 71 U.S. at 120-21, observed that ours is a Constitution for both times of peace and times of war. Speaking 80 years later, Justice Murphy stated,

> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. . . . Constitutional rights are rooted deeper than the wishes and desires of the military.

Duncan, 327 U.S. at 330, 332 (Murphy, J., concurring). If the Court determines that the Executive is empowered to detain an enemy combatant, it should declare that such power must be limited by the procedural due process requirements

of notice and the right to be heard, access to counsel, and application of the proper standard of clear and convincing proof.

Respectfully submitted,

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